IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

vs.

MIDWEST VIDEO CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF ILLINOIS AS AMICUS CURIAE

WILLIAM J. SCOTT,
Attorney General
PETER A. FASSEAS,
Special Assistant Attorney General
160 North La Salle Street
Chicago, Illinois 60601
ROLAND S. HOMET, JR.,
Special Counsel
Washington, D. C.

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QUESTION PRESENTED

Whether the Federal Communications Act establishes federal jurisdiction over intrastate wired communications, such as the locally originated cable signals covered by the Federal Communications Commission's regulations held invalid by the court below.

STATUTE AND REGULATIONS INVOLVED

Sections 2(a), 2(b), 3(a), 3(b), 3(h), 3(t), 221(b), 301(d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 152(a), 152(b), 153(a), 153(b), 153(h), 153(t), 221(b), 301(d), are set forth in the Appendix to this brief (*infra*, pp. A1-A3). Also set forth in the Appendix for this Court's information are the "Summary and Order" section of the Interim Opinion and Order adopted September 9, 1971 by the Illinois Commerce Commission in its Docket 56191 (Investigation of Cable Television and other forms of Broadband Cable Communications in the State of Illinois) (*infra*, pp. A16-A21); and Section B4 of the Notice of Proposed Rule Making adopted January 5, 1972 by the Illinois Commerce Commission in the same proceeding (*infra*, pp. A22-A31).[1]

AMPLIFICATION OF STATEMENT

An agreed glossary of terms may be helpful at the outset to the Court's understanding of this case. A good starting point is the "Definitions" section, § 76.5, of the comprehensive regulations recently adopted by the Federal Communications Commission. Cable Television Service, 37 Fed. Reg. 3252.[2] This section divides the signals that are carried over cable systems into four classes: (I) television broadcast signals, (II) non-broadcast signals, (III) scrambled non-broadcast signals, and (IV) return-path, or subscriber-originated, non-broadcast signals. All three varieties of non-broadcast signals (Classes II, III, and IV)

1. Copies of the full texts of both these documents have been lodged with the Clerk of this Court.

2. Copies of this report and order have also been lodged by the Solicitor General with the Clerk of this Court.

are collectively defined as "cablecasting" in subsection (v) of the regulations. Subsection (w) in turn defines the term "origination cablecasting" to mean:

> "Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator."

This case concerns "origination cablecasting" and it is the first case to reach the Court that involves any form of "cablecasting" at all. Signals carried by means of "cablecasting" originate and terminate in a coaxial cable, and thus — unlike the Class I signals passed upon by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) — they make no use of the radio spectrum at all.

The FCC regulations at issue in this case (Pet. App. C, p. 53)[3] purport to require cable systems having 3,500 or more subscribers to engage in origination cablecasting as a "local outlet" for "local production and presentation of programs." There is nothing in these regulations, or in the findings and conclusions adopted by the FCC in its *First Report and Order*, 20 F.C.C. 2d 201 (1969) (Pet. App. C, pp. 31-53), which requires or anticipates that such cablecasting will cross state lines.

Cable systems subject to the regulations are authorized to solicit commercial sponsorship and are adjured to behave in every respect as if they were broadcasters: subject to the equal-time, fairness-doctrine, and other restrictions developed by the FCC to deal with the spectrum limitations of over-the-air broadcasting. The FCC found and determined that *allowing* "origination cablecasting" would

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3. These regulations were at first suspended pending review by this Court, but have now been reinstituted to take effect March 31, 1972, with some alterations in wording. Cable Television Service, op. cit supra, §§ 76.201–76.221. See p. 12, infra, and the Appendix to this brief, p. A4.

not be unfairly competitive with the operations of its television broadcast licensees, because both broadcasters and cable operators would "stand on the same footing in acquiring the program material with which they compete." *First Report and Order, supra,* para. 5 (Pet. App. C, p. 33). The FCC did not find that *requiring* "origination cablecasting" by cable operators was necessary to protect the operations of broadcast licensees.

At the very close of its *First Report and Order* (Pet. App. C, p. 53), the FCC stated without elaboration of reasons that it was preempting State and local regulation "inconsistent with these Federal regulatory policies." And in its *Clarification of First Report and Order* issued shortly thereafter, 20 F.C.C.2d 741 (1969), the FCC ruled that this preemption covered local ordinances forbidding systems with fewer than 3,500 subscribers to engage in cablecast origination or to carry advertising—because such ordinances, even though not in direct conflict with the FCC regulations, were "inconsistent with Federal regulatory policies."

In its opinion setting aside these regulations as beyond the Commission's statutory authority, the Court of Appeals for the Eighth Circuit observed that cable operators obtain their licenses or franchises from state regulatory boards or municipalities; that Congress has made no attempt by legislation to preempt such authority; and that "problems arise with respect to encroachment on state and municipal rights . . ." (Pet. App. A, p. 22).

SUMMARY OF ARGUMENT

Basic to the FCC's "cablecasting" regulations is its determination that cable communications is a unitary enterprise which is to be regulated in its entirety by the

FCC as an appendage to broadcasting. As applied to "Class I" cable services of the sort involved in the cases previously brought before this Court—that is, the simple reception and delivery of off-the-air broadcast signals—there may be nothing exceptionable about this determination. As applied to the far more important and burgeoning origination and two-way services of which cable is capable, however, this determination may be disastrously in error and could preclude the realization of social values of the highest importance.

At stake in this issue are fundamental values of competition and free speech, as well as the genius and traditions of our federal system. We repeat here what we testified to the FCC; namely, that cable communications present the first opportunity in a lifetime to get away from the system of paternalism that has heretofore characterized mass communications in this country; and further, that there is neither need nor occasion to risk a single and pervasive federal error in addressing this opportunity.

Illinois' own hearings and investigations over the past year and more have strengthened this opinion. The coaxial cable grid that is laid down for cable television is capable, with the incorporation of suitable switching and terminal equipment well within the range of engineering feasibility, of affording opportunities both to receive and to transmit a whole new range and diversity of video, audio, and data-grade message services over the cable. Message origination and two-way, interactive communication opportunities can be opened up for elements in our society that are now excluded as a practical matter from participation in the marketplace of ideas. This is far too important a development to entrust to a single federal agency,

at least without the most careful and searching review and authorization by the Congress.

Treating cable operations for all purposes as an adjunct to broadcasting, susceptible to pervasive federal jurisdiction, would leave the important growth segment of those operations to struggle for uncertain acceptance within the existing broadcasting industry rather than through a newly separate and competitive communications structure. This in itself would place an intimidating chill on the innovative development of advanced cable communication services. More particularly, treating local cable origination as itself a broadcasting operation would clamp onto that origination all the paternalistic devices — the fairness doctrine, equal time, etc. — that have been forced onto over-the-air broadcasting by the spectrum limitations of that wholly different medium. Furthermore, it would subject the cable operator to advertiser control and reward, giving him an economic interest in the audience development of his own channel at war with his incentive to develop to the full other channels and services for community enrichment.

There is an entirely other way to approach the promise and potential of cable origination and two-way services. That is to treat the cable operator for these purposes as simply a carrier, separating if you will the medium from the message. Historically this has been the consistent approach taken at both State and federal levels to wired telecommunications in this country, through regulatory policies that leave no control over message content with the carrier. Control in this scheme of things is left solely to the senders and receivers of messages, subject only to the non-prior-restraints of the criminal law. This is common carriage, and it is essentially the system of regulation for

non-broadcast cable services selected after searching inquiry by the State of Illinois.

For present purposes this Court need not decide whether that selection is necessary or incumbent for the FCC within its Congressionally delegated domain of authority over interstate and radio communications. That is a matter for further consideration by the FCC itself, and the Congress. All that this Court need decide is that the choice made by Illinois and other States is permissible, within their domain of authority over intrastate, non-radio (wired) communications. Because local cable origination in its present state of development is an intrastate form of wired communications (as the FCC itself has recognized, *Common Carrier Tariffs for CATV Systems,* 4 F.C.C. 2d 257, 260 (1966)), that conclusion will lead to invalidation of the rule at issue in this case.

Section 2(b) of the Federal Communications Act of 1934, in conjunction with section 301 of that Act, withholds from the FCC "jurisdiction with respect to (1) charges, clastifications, practices, services, facilities, or regulations for or in connection with intrastate communication services by wire . . . of any carrier. . . ." The term "carrier" is defined in Section 3(h) so as to exclude broadcasters but include carriers by wire, which are subdivided into (1) those engaged "in interstate or foreign communication", and (2) all others, "where reference is made to common carriers not subject to this chapter." Section 221(b) illustrates the operation of this distinction as applied to telephone exchange services, none of whose practices, services, etc. fall within the FCC's jurisdiction "even though a portion of such exchange services consists of interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority." This statutory scheme is

the outgrowth of a long-established tradition leaving to State and local governments the authority to regulate intrastate wired communications services, notwithstanding that the physical plant used to provide such services is also employed in the furnishing of interstate services over which the federal government has assumed jurisdiction. See, *e.g.*, the Mann-Elkins Act of June 18, 1910, ch. 309, 36 Stat. 539, 545; *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 150-51 (1930).

Nothing in any previous decisions of this Court authorizes a departure from that tradition as regards services provided by broadband cable systems. The Congress has consistently declined to confer plenary jurisdiction over such systems on the FCC. And the White House Office of Telecommunications Policy, speaking for the Administration, has formally informed the Congress that the FCC's regulations dealing with local cable services and the division of federal-State authority over such services, "are predicated on unclear authority and address issues of major national concern", which will require "thorough Congressional review" on the basis of legislative proposals to be made by a Cabinet Committee created by the President. (See Appendix, pp. A12-A15.)

Numerous States have now adopted or are in the process of considering legislation and regulations treating broadband cable communications as a public utility. Their authority to do so was upheld by this Court in *TV Pix, Inc.* v. *Taylor*, 396 U.S. 556 (1970), *affirming* 304 F. Supp. 459 (D. Nev. 1968), to the extent not validly preempted by authorized regulations of the FCC. As was held by the three-judge District Court in that case (304 F. Supp., at 463), in the regulation of cable systems "national uniformity is probably not a possibility, let alone an accept-

able ideal." The Illinois Commerce Commission, for example, has concluded on the basis of detailed findings from an evidentiary record covering more than four months of hearings, that cable services are functionally equivalent to telephone services for the purpose of State regulation; and it is proposing to require that message origination and reception services be made broadly available for public use without content control of those messages by the cable operator. (See Appendix, pp. A16-A21.)

The FCC has made no findings and assigned no reasons that would justify its intrusion upon, or interference with, this sort of State regulation. Its attempt to link local cablecast operations, over which it has no authority, with carriage of television broadcast signals, over which it does have authority, is a form of "unstatutory condition" exactly akin to the "unconstitutional conditions" consistently struck down by this Court. See *Frost & Frost Trucking Co.* v. *R.R. Commission of California,* 271 U.S. 583, 593 (1926); *Sherbert* v. *Verner,* 374 U.S. 398, 404-406 & n.6 (1963); Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1609 (1960). To be valid, the purported condition must itself fall within the scope of the FCC's Congressionally delegated authority, which it does not do. Further, even assuming that the FCC could regulate intrastate wired communications upon a finding of adverse effect upon interstate or radio communications subject to the Commission's supervision, the FCC has made no such findings to support its "origination cablecasting" regulation. Quite the contrary, it has found that cablecasting should be permitted despite its competitive effect on television broadcasting. Permission and requirement are, of course, two very different matters.

If any confusion or inconvenience should arise as a result of disparate State and federal regulation of the

intrastate and interstate operations of cable systems, "these considerations are for the practical judgment of Congress in determining the extent of regulation necessary . . . to conserve and promote the interests of interstate commerce." *The Minnesota Rate Cases,* 230 U.S. 352, 432 (1913). What must be stressed in this case is that due recognition of State regulatory competence will *not* produce or permit the chaotic interference of over-the-air radio broadcast signals that led the Congress to confer centralized jurisdiction in the FCC over radio communications. *Compare* § 301(d) of the Federal Communications Act, vesting exclusive federal authority over intrastate radio communications "when interference is caused by such use or operation" with the transmission or reception of interstate radio communications. The Congress has sanctioned no such unified federal authority over intrastate wired communications, and the FCC should not be permitted to disturb that judgment until and unless the Congress directs it to do so.

ARGUMENT

I.

THE FCC REGULATIONS WITH RESPECT TO LOCAL ORIGINATION CABLECASTING CONFLICT WITH RULES GOVERNING LOCAL CABLECAST SERVICES THAT HAVE BEEN AND ARE BEING DEVELOPED BY STATES SUCH AS ILLINOIS.

In its Notice of Proposed Rule Making adopted January 5, 1972, the Illinois Commerce Commission addressed itself among other things to the non-broadcast services to be provided over cable systems. In pertinent part, the Notice proposed (Appendix, p. A22-A23):

> "First, either separately or in conjunction with local program origination, one channel should offer passive display services on a continuing 24-hour basis: time and weather and the day's program log on all channels, both broadcast and nonbroadcast, at a minimum. These passive displays may also carry advertising on the top or bottom half of the screen. Second, the cable operator *may* offer its own local programming, over the same or one different channel, but only on a non-profit basis; that is, the sum total of any advertising revenues it earns in connection with such programming must recover no more than its direct costs. The Commission's concern here is to avoid giving the cable operator a proprietary interest in its own programming that could conflict with the public interest in promoting widely diverse programming opportunities on the other cable channels. It should be noted that the FCC's local origination requirement has been suspended pending the outcome of the *Midwest Video* litigation previously referred to; and in any case its definition of 'cablecasting', namely programming 'originated by the CATV operator or by another entity',

> can be satisfied by ensuring adequate local access to free or leased channels as described below. This Commission does not believe that either the 'equal time' or 'fairness' provisions of FCC regulations are properly applicable to cablecast programming, so long as ample channel capacity is provided over public-access and leased channels to accommodate all points of view."

There are several respects in which these proposed rules may be found to conflict with the origination cablecasting regulations adopted by the FCC. First, the Illinois Commission is proposing that operators "may" engage in their own programming, not "must"; this would appear to run afoul of the FCC's own view of its preemption powers, as indicated in its *Clarification of First Report and Order,* 20 F.C.C. 2d 741 (1969). Second, the Illinois Commission's suggestion that local cablecasting can be carried out by entities other than the operator would circumscribe the choice that the FCC indicated must be left to the operator; in any event, the FCC definition has since been changed so as to specify that "origination cablecasting" must be "subject to the exclusive control of the cable operator." Cable Television Service, 37 Fed. Reg. 3252, § 76.5(w). Third, the limits proposed by the Illinois Commission on advertising revenue find no counterpart in the FCC regulations—which, despite their confinement of advertising to "natural breaks" in the cablecast, are still clearly designed to give the cable operator a revenue incentive to engage in its own programming. Finally, of course, the Illinois Commission proposal that neither the "equal time" or "fairness" provisions of FCC broadcast regulations is properly applicable to cablecasting over a diversity of channels squarely conflicts with the FCC regulations imposing these and other broadcast-type

restrictions on "origination cablecasting". (Pet. App. C, pp. 53-55; Cable Television Service, 37 Fed. Reg. 3252, §§ 76.205-76.221).

The Illinois Commission did not adopt its proposals out of a spirit of contrariness; rather, it fashioned these proposals out of a searching investigation of the nature and potential of this new medium of communications, calling in the process on the assistance of the best-qualified experts it could find throughout the country. It is now a commonplace that cablecasting provides an economy of abundance in contrast to the economy of scarcity dictated by the spectrum limitations of over-the-air broadcasting. See, *e.g.*, On the Cable: The Television of Abundance (Report of the Sloan Commission on Cable Communications, 1971), pp. 42-46. Given adequately abundant and reliable channel capacity on the cable, the incremental costs of providing origination opportunities are very low indeed as compared with broadcasting. This opens up a new medium of communications for minority interests of various sorts — ethnic, cultural, economic, and political — heretofore excluded as a practical matter from access to the advertised-supported mass medium. All points of view can be presented without artificial attempts at balancing of presentations on a single channel. The costs of reaching electoral constituencies on cable channels — without also reaching, and paying for, non-constituents as is now the case on broadcast television — can also be brought within the grasp of any candidate.[4]

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4. Cablecasting, in other words, provides an unparalleled opportunity to escape from the practical limitations on freedom of speech that this Court has long recognized to be associated with broadcasting:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is

Against this background the Illinois Commerce Commission could reasonably propose, as it has, that cable operators should not be confronted with a conflict of interest between the origination opportunities they can thus make available as carriers, and the revenues they might themselves gain as programmers. A great deal of market testing remains to be carried out before the full panoply of commercially feasible cablecast services can be determined, and this will require innovative service experimentation on the part of program and service suppliers of all sorts, as well as hospitality to such experimentation by cable operators. See "New Cable Services — A Step Nearer", January, 1972 release by Arthur D. Little, Inc. (Appendix, pp. A35-A37). The Illinois Commission could reasonably judge that the removal of disincentives to market development of new cable services would be in the public interest.

The Illinois Commerce Commission's proposals in this respect must be viewed in the context of established objectives of State public utility regulation. The Illinois Public Utilities Act, for example (Ill. Rev. Stats., Ch. 111⅔), vests the Illinois Commission with general supervisory jurisdiction over public utilities (Sec. 8); prohibits preferences or unreasonable differences in "charges, facilities, services, or in any other respect" (Sec. 38); entrusts the Illinois Commission to fix upon adequate, just, and reasonable practices, equipment, facilities and services (Sec. 49); authorizes the Commission to order improvements, additions or changes in plant and facilities in order "to secure adequate service or facilities" (Sec. 50); and empowers the Commission to establish standards for the

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its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."

National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

quantity and quality of services (Sec. 54). In pursuit of these legislative guidelines, the Illinois Commission has proposed a variety of rules for the regulation of local cablecast services — as to the number and configuration and expansion of cable channels and associated equipment, the provision of two-way capacity, and the furnishing of particular cable services such as channels for local-government and school-system use — which overlap and to some extent very probably conflict with the "Federal regulatory policies" on these matters adopted by the FCC. *Compare* Illinois Commerce Commission Notice of Proposed Rule Making (Appendix, pp. A22-A31), *with* Cable Television Service, 37 Fed. Reg. 3252.

Such regulatory challenges to federal intrusion are inherent in State public utility regulation, which concerns itself with the non-discriminatory offering of adequate local services for public use. The challenge is posed not just by Illinois but by the seven other States which, like Nevada (whose statute was sustained by this Court in *TV Pix, Inc.* v. *Taylor*, 396 U.S. 556 (1970)), have adopted or construed public-utility legislation to apply to cable television;[5] by the four States which, like New York, have imposed or obtained consent to a moratorium on cable activity pending adoption of statewide laws;[6] and by at least the twenty-one additional States which were actively considering legislation by the close of 1971.[7] This growing array of States concerning themselves with public utility regulation of cable systems marks a significant change in the situation as described to this Court in *United States*

5. Conn. Gen. Stats., ch. 289, secs. 16-330 through 16-333; Mass. Laws, ch. 1103 (1971); Nevada Rev. Stats., sec. 711.010 et seq.; R. I. Gen. Laws, sec. 39-19-1 through 39-19-8; Vt. Stats. Ann., tit. 30, ch. 13; Opinion of Hawaii Attorney General, Dec. 1, 1969, [1969] State Util. L. Rep. § 21,206. The Alaska Public Service Commission has also advised the General Counsel of the National Association of Regulatory Utility Commissioners that it has adopted statewide regulation of cable television.

v. *Southwestern Cable Co.*, 392 U.S. 157, 163 n. 15 (1968), when only two States, Nevada and Connecticut, were said to be regulating cable systems.

The public policy importance of this development cannot be overstated. As phrased by the White House Office of Telecommunications Policy, the nature of regulations adopted with respect to cablecasting, including in particular the division of federal-State authority over broadband cable services, "will shape the economic structure, and indeed the character, of the new medium." (Letter to the Chairman of the Senate Commerce Subcommittee on Communications, November 15, 1971; Appendix, p. A15.) To the extent that the States are permitted through public-utility regulation to foster the development of local communications services over cable systems, the way can be opened to realization of the promise of a brand new and diversified communications medium. If, on the other hand, the whole of cable communications is subjected to pervasive FCC jurisdiction, as somehow "ancillary" to its responsibilities for the promotion of mass-audience broadcasting, the local-service growth segment of cable communications may be placed permanently at the sufferance of the broadcasting industry. Even the most cursory review of the record of FCC proceedings with respect to cable television over the past decade will reveal how unremitting has been the opposition of broadcasters to each small advance in the latitude afforded cable systems. See, *e.g.*, *Second Report and Order*, 2 F.C.C. 2d 725 (1966); *Notice of Proposed Rule Making and Inquiry*, 15 F.C.C. 2d 417 (1968); Cable Television Service, Appendix D, 37 Fed. Reg. 3252, 3341 (1972) (industry "consensus agreement"

6. N.Y. Laws, ch. 419 (1971); N. J. Laws, ch. 221 (1971). Wisconsin and the District of Columbia have adopted voluntary moratoria.

7. Tabulation compiled by the office of General Counsel, National Cable Television Association, on the basis of a countrywide daily news clipping service. Three more States have been added to the list thus far in 1972, leaving only 14 States that are not currently concerning themselves with the issue.

imposing program-exclusivity restrictions on the distant-signal importation rights proposed by the FCC). In such a regulatory environment, the incentives to local service innovation over cable systems could be severely curtailed.

II.

STATE RATHER THAN FEDERAL REGULATION OF LOCAL CABLECAST SERVICES ACCORDS WITH THE TRADITIONAL ALLOCATION OF COMPETENCE OVER WIRED COMMUNICATIONS AS BETWEEN STATE AND NATIONAL GOVERNMENTS.

In *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 359 (D. Nev. 1968) (three-judge court), *aff'd mem.*, 396 U.S. 556 (1970), State public-utility regulation of cable television systems was upheld against assaults based on the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, as well as alleged Congressional preemption of the field. The court held that cable television is a local business involving services to local residents through cables strung over local streets and ways. Although a cable system may be engaged in the interstate transmission of broadcast television signals,

> "... in its impact on interstate commerce, [it] is analogous to a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee. Appropriate state regulation of such primarily local facilities or services in interstate commerce, in the absence of federal legislative intervention, is not proscribed by the Commerce Clause of the Constitution. Cooley v. Board of Wardens, 1851, 12 How. 299. . . ." (304 F. Supp., at 463.)

The court further held that public-utility regulation of cable rates and services was not a matter requiring na-

tional uniformity: "National uniformity is probably not a possibility, let alone an acceptable ideal." (*Ibid.*) Against this background it held that State regulation even of matters having to do with interstate transmission was not preempted by the Federal Communications Act, although the FCC might by valid regulation supersede a state regulation "in actual conflict" with it.

The *TV Pix* case dealt only with interstate delivery of television broadcast signals. It thus had no occasion to consider whether the FCC had or could preempt regulatory authority over intrastate cablecasting. The same is true of *United States* v. *Southwestern Cable Co.*, in which this Court observed that the cable system there before it did not engage in cablecast programming, 392 U.S., at 162 & n. 9; and also of *Fortnightly Corp.* v. *United Artists*, 392 U.S. 390 (1968), which did "not deal with program origination" over cable systems (at 392 n. 6). The question presented in this case is thus one of first impression as regards cable television—though by no means a novel question in the history of wired communications.

To appreciate the tradition and appropriateness of State concern with intrastate wired communications, it may be helpful briefly to recite the Illinois Commerce Commission's own involvement in this subject. Ever since 1913, that Commission or its predecessor has been entrusted with public-utility supervision over "the transmission of telegraph or telephone messages within this State." (Ill. Rev. Stats., ch. 111⅔, § 10-3(b).) In its proceedings culminating in the Interim Opinion and Order of September 9, 1971 (excerpted in Appendix, p. A16), the Illinois Commerce Commission conducted a searching inquiry into the similarities and differences between telephone and broadband-cable messages. Over the course of four months of hear-

ings, it sought out and questioned the best-qualified experts it could find in the fields of law, and engineering, and finance, and marketing. These experts came from all over the country, from Canada, and from England, and they testified to the Commission at length rather than in the snatches of time made available by the FCC.[8] On the basis of the extensive record thus compiled, and its own regulatory experience, the Illinois Commission found that "telephone . . . messages" subject to its jurisdiction had expanded in practice to cover voice, data, telemetry, picture phone, and television transmissions — or what it called "total telecommunications" services. The Commission further found that broadband cable systems are functionally equipped to provide at least the same range and diversity of services; that they will have to compete with telephone companies for long-range financing in the same financial markets; and that the technical method of operation of the two industries is closely parallel. As a result, it determined that both industries should be regarded as subject to the same general scheme of State public-utility regulation. The Commission, in other words, developed exactly the same kind of expert findings and conclusions with respect to State regulatory jurisdiction as were recently approved by this Court in *Federal Power Commission* v.

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8. Examples are: Peter Goldmark, then CBS Laboratories president and inventor of color television and the video cassette, half a day; Paul Kagan, publisher of the leading cable industry financial newsletters "Cablecast" and "Datacast", a full day; Robert Brooks, cable engineering consultant with 18 years' experience in the business, three and a half days; Stephen Barnett, communications law expert and consultant to the Sloan Commission among others, half a day; Ralph Gabriel, chairman of Rediffusion, Ltd., London, which has developed dial-access cable systems, half a day; and leading engineers, economists, and lawyers from the fields of broadcasting and telephony as well as cable television. The first three named witnesses were not invited to testify before the FCC's March 1971 comprehensive hearings at all, while the others were restricted to five- or ten-minute presentations.

Florida Power & Light Co., ——U.S.——, 40 U.S. Law Week 4141 (Jan. 14, 1972) with respect to federal regulatory jurisdiction.

What remains is accommodation of the reach of State and federal jurisdiction when, as here, they are asserted to conflict. Section 90 of the Illinois Public Utilities Act (Ill. Rev. Stats., ch. 111⅔, § 94) provides for such accommodation by declaring its inapplicability to interstate and foreign commerce "except to the extent permitted under the provisions of the Constitution of the United States and Acts of Congress, and the applicable decisions of the Supreme Court of the United States." We already know that the Commerce Clause of the Constitution does not of its own force prohibit State regulation of intrastate wired communications, even when such communications are an integral extension of interstate commerce. *TV Pix, Inc.* v. *Taylor*, 396 U.S. 556 (1970). It therefore becomes necessary to inquire what Congress and this Court have traditionally recognized to be the appropriate division of authority over wired communications. And there is no more pertinent history for this purpose than the history of telephone regulation.

State regulation of telephone services long preceded federal regulation. State regulatory commissions were exercising jurisdiction over intrastate message services, which was then and still is the lion's share of the business, for more than a quarter of a century before Congress vested effective regulatory authority in the FCC. See Gabel, Development of Separations Principles in the Telephone Industry 16-26 (1967).[9] And when it did so, it took care

9. By 1917 all but three of the States had vested regulatory power in their public utilities commissions over rates and practices of telephone systems. H. Rep. No. 109, 67th Cong., 1st Sess., p. 3 (1921).

to preserve State authority over the intrastate aspects of the business.

There is in fact a long tradition of Congressional deference to State regulation of intrastate services, including telecommunications services, in the various Interstate Commerce Acts that preceded the Federal Communications Act of 1934. See *The Minnesota Rate Cases*, 230 U.S. 352, 417-19 (1913). Typical is the proviso in the Mann-Elkins Act of June 18, 1910, ch. 309, 36 Stat. 539, 545: "*Provided, however*, That the provisions of this Act shall not apply to the . . . transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid." This negation of federal authority was carried forward and continued in section 2(b) of the Federal Communications Act of 1934, as amended, 47 U.S.C. § 152(b), which provides that "'nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication services by wire or radio of any carrier. . . .'"

To be sure, this separation of authority has caused and is causing practical difficulties with respect to sorting out the interblending of operations in the conduct of interstate and local business by interstate carriers. See *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 150-51 (1930); Gabel, *op. cit. supra, passim.* But this is the price of preserving a healthy federal system. As stated by Justice Hughes in *The Minnesota Rate Cases, supra*, 230 U.S., at 431: "... our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency."

The same division of authority is fully applicable to broadband telecommunications, employing video as well as audio and data-grade signals. Apart from the carriage of

broadcast signals, which are interstate and incidental to radio communications—hence within the authority of the FCC as held by this Court in *Southwestern Cable*—the message services to be performed by cable systems are predominantly local and intrastate in character. This is true of meter-reading, of community program origination, of library information retrieval, of one-way and two-way instructional services, of cable conferencing between branches of a business or a university, of tele-shopping, indeed of virtually all the services that are anticipated. Eventually interstate links may be developed for cablecasting, and these will be appropriate for federal regulation either by a fresh grant of statutory authority or through a finding by the FCC—comparable to the finding by the Illinois Commerce Commission—that broadband cablecasting is a form of interstate common carrier service. We have had no such federal finding or legislation to date.

III.

NOTHING IN THE FEDERAL COMMUNICATIONS ACT OR THE DECISIONS OF THIS COURT PURPORTS TO ALTER THIS TRADITIONAL DIVISION OF AUTHORITY AS REGARDS INTRASTATE CABLECAST COMMUNICATIONS.

As previously indicated, none of the cable television cases previously decided by this Court has involved cablecasting. Each has focused instead exclusively on the carriage by cable systems of off-the-air broadcasting. The dicta in this Court's opinion in the *Southwestern Cable* case, referring to the "unified jurisdiction" and "broad authority" of the FCC, must be read in this context; for the Court first found and determined that the carriage of broadcast signals was a form of "interstate and foreign

communication by wire'' within the meaning of Section 2(a) of the Communications Act. The present case of course involves not interstate broadcast signals, but intrastate cablecast signals that fall within the scope of Section 2(b) of the Act disclaiming federal jurisdiction.

The FCC *was* given an exceptional grant of ''broad'' and ''unified'' jurisdiction over radio (and television) broadcast signals in Section 301(d) of the Act, which is the only provision in the statute conferring authority over wholly intrastate communications. This was done to avoid the problems of signal interference peculiar to over-the-air broadcasting. Radio broadcasting is also singled out for exceptional treatment in Section 3(h), which provides that ''a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.'' Neither of these special provisions is made applicable to wire communications.

It was to protect the exercise of the FCC's exceptional authority over radio broadcasting that this Court in *Southwestern Cable* upheld that Commission's jurisdiction over cable television systems, insofar as they engage in interstate reception and delivery of such broadcasting. The brief presented for the United States stipulated that the FCC was asserting authority only over the carriage of broadcast signals by cable systems.[10] This Court's holding was correspondingly confined to a recognition of FCC authority under Section 2(a) of the Act; and even this authority was expressly ''restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcast-

10. Brief for the United States and the Federal Communications Commission in United States v. Southwestern Cable Co., No. 363, O.T. 1967, p. 42.

ing." 392 U.S., at 178. The Court intimated no view as to the authority, if any, of the FCC to regulate cable systems under any other circumstances or for any other purposes.[11]

In its subsequent *Notice of Proposed Rulemaking and Notice of Inquiry* proposing the cablecast origination rules at issue in the present case, the FCC made clear that it did not consider its authority to adopt such rules had been settled by *Southwestern Cable*. It stated that in proposing these rules, "the Commission is clearly concerned with *new and important questions of policy and law* in the communications field, and would welcome congressional guidance as to policy and *legislation conferring direct general authority over CATV*." 15 F.C.C. 2d 417, 421 (Dec. 12, 1968) (emphasis added).

As this Court knows and indeed observed in *Southwestern Cable*, the Congress has never adopted legislation giving the FCC plenary authority over cable systems. (See 392 U.S., at 164-65 & nn. 19-22, and at 170-71 & nn. 30-31). The FCC tried to obtain such authority in 1959 and again in 1966; in both cases legislation was reported out of committee but failed to gain floor approval. The 1966 legislation, significantly, would have amended Section 3(h) of the Communications Act to provide that "a person engaged in radio broadcasting *or in operating a community antenna system* shall not, insofar as the person is so engaged, be deemed a common carrier." H. Rep. No. 1635, 89th Cong. 2d Sess. (1966) (amendment in italics). That did not pass; and neither has the latest Commission legislative proposal, which would add a new Section 331 to the Act giving the Commission rulemaking au-

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11. The earlier decision of the court of appeals in Buckeye Cablevision, Inc. v. Federal Communications Commission, 387 F. 2d 220, 224-25 (C.A.D.C. 1967), was similarly limited in scope and effect.

thority over "multiple reception, *origination* and related services" performed by cable systems. S. 792, 92nd Cong. 1st Sess. (1971) (emphasis supplied). (See Appendix, p. A33.)

While Congressional inaction may lack dispositive significance in relation to FCC regulation of interstate communications,[12] which are already covered by Section 2(a) of the Act, it surely must be treated as significant in relation to intrastate communications which historically have always been exempt from federal regulation under Section 2(b) of the Act and predecessor statutes. The plain fact is that without new legislative authority the FCC simply does not have power to regulate such communications.

This much has been recognized by the communications-policy spokesman of the Executive branch, albeit in diplomatic language. On November 15, 1971, the Director of the White House Office of Telecommunications Policy, who is also acting as chairman of a Cabinet Committee established by the President to formulate policy with respect to broadband cable communications, responded as follows to a request from the Chairman of the Senate Commerce Subcommittee on Communications for comment on the FCC's cablecasting regulations:[13]

> "• • • • • •
>
> Turning now to those aspects of the proposals which go beyond the conditions of cable retransmission of over-the-air signals, relating to broadband cable as a communications medium in its own right: These aspects of the proposed rules (together with existing rules and further contemplated rulemakings) involve such matters as Federal preemption of state and local

12. See United States v. Southwestern Cable Co., supra.

13. The full text of the letter appears in the Appendix, p. A12.

control, the extent of FCC supervision of programming, limitations on numbers of channels, flexibility with respect to new services, and prescribed channel usage. These and other matters of like importance will shape the economic structure, and indeed the character, of the new medium. They are the subject of the Cabinet Committee's work and will ultimately require careful Congressional consideration. The Commission itself has noted that the recent *Midwest Video* case casts doubt upon the legality of this type of regulation, and it has requested Congressional clarification. Similarly, we believe the 1934 Communications Act provides inadequate guidance for the regulation of broadband cable communications. Therefore, while we favor immediate implementation of the proposed rules in order to permit the growth of cable television, our recommendation is based upon the hope and expectation that Congress will address these fundamental aspects of broadband cable policy at an appropriate time, before the economics of the industry and the character of the medium have become irreversibly set in the mold contemplated by the Commission."

This Court can give the Congress an unfettered opportunity to consider appropriate broadband cable policy for the future, by making clear the division of authority over interstate and intrastate cable communications under the existing Federal Communications Act.[14]

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14. We may dispose in footnote of two suggestions advanced by the FCC. One is that the enactment of copyright legislation as proposed by the FCC would ratify that Commission's jurisdiction to adopt all of its presently pending rules, including those relating to cablecasting. Cable Television Service, 37 Fed. Reg. 3252, para. 65(iii). Of course, the copyright compromise between industry groups, to which this refers, was worked out in the context of regulations dealing with permissible broadcast-signal importation and has nothing whatever to do with cablecasting or federal-State relations, id. para. 62. Furthermore, copyright legislation will issue if at all from a wholly separate committee than the one that exercises legislative oversight over FCC activities, see id. Appendix E. Similarly defective is the

IV.

THE FCC HAS MADE NO FINDINGS AND ASSIGNED NO REASONS THAT WOULD BRING INTRASTATE CABLECAST COMMUNICATIONS WITHIN ITS CONGRESSIONALLY AUTHORIZED SPHERE OF AUTHORITY.

The "purposes of the Communications Act", much referred to by the petitioners, do not extend to intrastate wired communications. According to Section 1 of the Act, 47 U.S.C. § 151, the overall objective was one of "regulating interstate and foreign commerce"; and the goal of extending wire and radio communication service broadly to all the people of the United States was to be achieved

> "by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication. . . ."

The Act centralized authority as among federal agencies but did not authorize invasion of the authority exercised by State agencies over intrastate wired communications.

One may agree, as the Illinois Commerce Commission has agreed, that cablecasting is in the public interest and should be promoted. But the purposes of the Communications Act do not in operational terms carry this far, and do not confer federal authority to require or regulate such communications. That is a matter for the States. See Sections 2(b), 3(h), 3(t), and 221(b) of the Act, 47 U.S.C. §§ 152(b), 153(h), 153(t), 221(b).

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suggestion in the petitioners' brief (Pet. Brief, p. 13 n.10) that enactment of a campaign expenditure law — again issuing from a variety of committees and governing expenditures for all media including newspapers and billboards — somehow translates into plenary federal jurisdiction over broadband cable communications.

The conditional form in which the FCC's cablecasting regulations are couched does not save them from invalidity. The FCC of course has authority to grant or deny distant broadcast-signal importation by cable systems, *United States* v. *Southwestern Cable Co., supra.* But to grant importation rights on conditions relating to matters beyond the agency's authority is the exercise of a greater power rather than a lesser. See Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1609 (1960): "The power to impose conditions is not a lesser part of the greater power to withhold, but instead is a distinct exercise of power which must find its own justification. In the area of regulation, withholding and licensing with conditions are alternative instruments for the regulation of conduct. . . ." This is indeed the teaching of this Court's own decisions, which have consistently recognized that conditional regulation involves not a single power but two separate powers each of which must stand on its own footing. In form, the conditional regulation appears to offer a choice. "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool. . . ." *Frost & Frost Trucking Co.* v *R. R. Commission of California,* 271 U.S. 583, 593 (1926); *accord, e.g., Sherbert* v. *Verner,* 374 U.S. 398, 404-06 & n. 6 (1963). An *ultra vires* condition is no less invalid for being a condition.[15]

15. Suppose the FCC were to consider "seminar" conference calls among members of community interest groups a desirable use of wired communications, and accordingly conditioned an interstate telephone rate increase by the Bell System upon simultaneous reduction in local exchange rates for such services. Would anyone contend that this was authorized? The fact is that the FCC has never presumed to dictate the intrastate disposition of earnings or savings on interstate telephone business created by its rulings. See Gabel, Development of Separations Principles in the Telephone Industry (1967).

Nor is the FCC's position aided by the "end use" theory it predicates on *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). In that case the question was whether the Power Commission could decline to certificate interstate transportation of natural gas because of inferior uses to which it would be put by the end consumer. The Commission's order was one over which it had clear statutory authority, the only question being whether it could act on the basis of reasons falling outside its jurisdiction. At most, the *Transcontinental* decision would authorize the FCC in the present case to consider whether and to what extent distant-signal authorization will be put to socially useful purposes by cable operators. The FCC in fact *has* considered that question, and has determined that the distant-signal authorization scheme it has developed "should serve to create an *incentive* for the development of those nonbroadcast services that represent the long term promise of cable television and are critical to the public interest judgment we have made." Cable Television Service, 37 Fed. Reg. 3252, 3260 (para. 60) (emphasis supplied). This is the furthest the FCC can carry *Transcontinental*; and, of course, incentives are very different from requirements.

Transcontinental is distinguishable from the present case in yet another important way. The "broader principle" on which the Court rested its judgment was the practical one of preventing a regulatory "no man's land":

> "That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." (365 U.S., at 19-20.)

The Court decided that consuming States could not be expected to deny themselves the use of natural gas that

would deplete the resources of producing States, and therefore upheld federal power. In our case, however: (1) we do not really have a borderline question; (2) the withholding of Congressional authority is quite explicit; (3) cablecasting is not an interstate transmission of resources originating in other States, but a purely local communication of messages originating and terminating within the same State; and (4) the interest and ability of State authority to create and administer a proper regulatory context for cablecasting actually exceeds that of the FCC.

At latest count there are in this country more than 2,500 cable systems in operation, a like number that are franchised but not yet in operation, and a somewhat greater number with franchise applications pending.[16] The notion that a single federal agency, no matter how well intentioned, can supervise the local service adequacy of each of these systems, let alone adjudicate "fairness" and "equal time" complaints arising out of each, has about it something of the bizarre. The FCC regulations are likely to be observed mainly in the breach, if State and local governments are required to stand aside. There is no need for this to happen. State regulatory commissions and their staffs are quite accustomed and capable of assuring the adequacy of facilities and practices for local services such as message origination; and an increasing number of them are seeking to do just that.[17] This Court should not sanction an illusory federal preemption that would leave local service needs inadequately attended.[18]

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16. Pet. Brief, p. 19.

17. See p. 15, supra.

18. In its resolution of the issue of television broadcast signal carriage by cable systems, the FCC observed that its distant-signal program "melds techniques with which we have had experience—exclusivity and a limitation on the number of distant signals to be imported." Cable Television Service, 37 Fed. Reg. 3252, 3260 (para.

Other reasons advanced by the FCC after the fact, to justify its displacement of State and local authority over cablecasting, are no more persuasive. These are set forth in paragraph 130 of the opinion accompanying the FCC's just-adopted comprehensive cable rules (37 Fed. Reg. 3252, 3270):

> "It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access [*i.e.*, cablecast] program; rather, the subscriber will simply turn the dial from broadcast to access programming, much as he now selects television fare. Moreover, leased channels will undoubtedly carry interconnected programming via satellite or interstate terrestrial facilities, matters that are clearly within the Commission's jurisdiction. Finally, it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels, and we have already taken steps in that direction. (See § 76.225). Federal regulation is thus clearly called for."

For these reasons, and because "a dual form of regulation would be confusing and impracticable" (para. 131), State and local regulation of cablecast channels is to be precluded.

We may consider each of these purported reasons in turn.

Generally speaking, it is true that both broadcast and cablecast programming will be received by the subscriber

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59). The FCC has, of course, had no experience with regulation of local service cablecasting. This is not to suggest that the FCC may never experiment with new regulatory ventures in fields over which it has authority; it is just that the balance of experience, insofar as that is a pertinent consideration, favors State regulatory commissions rather than the FCC.

on the same cathode ray tube;[19] for regulatory purposes, however, this is irrelevant. Provision of telephone services also involves the use of a single physical plant interchangeably for both local and interstate services. This is most obvious in the case of the telephone handset itself. The subscriber has no idea when he picks up the telephone whether the message will be local or interstate. (By contrast, the cable subscriber can choose for himself whether to select a channel carrying a broadcast signal or to dial for a locally-originated program or other service.) But the telephone plant is even more extensively interchangeable — land and buildings, circuit equipment, local dial and other switching equipment, station equipment, outside plant, and general equipment are all used for both local and interstate services. Yet they are subject to dual regulation by federal and State governments on the basis of interstate vs. intrastate use. Gabel, *op. cit. supra*, at 140-143.

The same is again applicable to cable systems. The antennas mounted on the system's tower to capture broadcast signals are not employed in local cablecast services. But the control office and coaxial cable grid — comprising cables, amplifiers, drop wires, and the home terminal itself — are all used or useful in both local and interstate services. In the field of wired communications, this Court has long recognized the necessity to preserve separate State and federal regulatory authority notwithstanding the intermingling of property for these two uses. *Smith* v. *Illinois Bell Tell. Co.*, 282 U.S. 133, 150-51 (1930) (Hughes, C.J.).

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19. Home terminal equipment designed exclusively for cablecasting — such as two-way monitoring and control devices, unscrambling controls, and program-ordering dials or keyboards — are now being engineered and in some cases produced. None of these has any foreseeable application to broadcast programming.

As to interstate connections for cablecast programming via satellite, microwave, or interstate cable, if and when such instrumentalities are developed it is true that federal regulatory authority will attach to *them*. But that authority would still not extend to local cablecast services *per se*. In any event, nothing in the regulations at issue in this case turns on the presence or absence of interstate connections.

The FCC's pay cable regulations are not at issue in this case, although it may be noted that the Commission has authorized pay cable operations. Even here there is a serious question about the Commission's authority over a wholly local pay cable offering, such as a local performance of a play or sporting event carried over the cable. See Section 2(b) of the Federal Communications Act. But assuming that the Commission could grant or deny local pay cable offerings that it found would hurt its broadcast licensees, that would not confer authority to require or regulate local cablecast services in the absence of any finding that such operations are needed to protect broadcast stations.

Here we come to a critical second point in the overall argument. It is the basic position of the State of Illinois that the FCC lacks authority under the Federal Communications Act to regulate intrastate wired communications for any purpose. Even if this were wrong, and the FCC could concern itself with intrastate wired communications when they have an impact on its delegated responsibilities under the Federal Communications Act—itself a highly dubious proposition, unsupported by anything in the Act or decisions of this Court construing it—the FCC has made no findings that would raise that issue for decision. It has not performed, in other words, the kind of

detailed jurisdictional fact-finding operation carried out for purposes of State law by the Illinois Commerce Commission and approved for purposes of federal law by this Court in *Federal Power Commission* v. *Florida Power & Light Co.*, ——U.S.——, 40 U.S. Law Week 4141 (Jan. 14, 1972). This is a vital failing; for, as was held in *The Minnesota Rate Cases*, 230 U.S. 352, 419-20 (1913), when it is sought to extend federal authority or displace State authority in a particular regulatory area because of an asserted impact on established Congressional objectives, the federal administrative agency must make findings keyed to the federal statute in question. This the FCC has not done.

First, it is crystal clear that the FCC has not found local origination cablecasting to be a form of interstate communications. Quite the contrary: In *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257, 260 (1966),[20] the FCC acknowledged that, in addition to the carriage of television broadcast signals, channels leased by cable operators from the telephone system also carry locally originated signals:

> "This means only that, as with most of the Bell System's communications facilities, the same facilities may be used jointly for both interstate and *intrastate* communications. This fact has no bearing on the interstate nature of the service in question except perhaps *to emphasize the distinction between the two types of service* and to strengthen the Commission's conclusion that *the further transmission of the TV signals* is interstate service." (Emphasis supplied.)

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20. This was part of an overall FCC proceeding ultimately affirmed by the court of appeals in General Telephone Co. of California v. Federal Communications Commission, 413 F. 2d 390 (C.A.D.C. 1969) (per Burger, J.), cert. denied, 396 U.S. 888 (1969).

Of course, the fact that the same cable may carry both interstate and intrastate communications services does not, under the clear language of Section 2(b) of the Federal Communications Act, confer federal authority over the "intrastate communication service."

Second, it is equally clear that the FCC has not found cablecasting to be a form of radio broadcasting. Again, quite the contrary is the case. The FCC has consistently found and determined that cable systems are not engaged in "broadcasting" within the meaning of the Act, because their transmissions are carried by wire rather than by radio. *CATV and TV Repeater Services,* 26 F.C.C. 403, 428-29 (1959); Cable Television Service, 37 Fed. Reg. 3252, 3277 (para. 191). It is worth noting that this determination is a matter of engineering fact, not susceptible to changing policy influence or choice.

Third, the FCC has not found that local origination cablecasting is required to protect the competitive operations of its broadcast licensees — the kind of determination upheld by this Court, vis-a-vis interstate cable operations, in *Southwestern Cable.* Quite the contrary, it has found that cablecasting should be permitted despite its competitive effect on television broadcasting. *First Report and Order,* 20 F.C.C. 2d 201, para. 5 (1969). Permission and requirement are, once again, very different matters.

Finally, it is true that the FCC has consistently held that cable operations do not constitute common carriage. But this is not so much a finding of fact as it is a policy conclusion for which the FCC must find statutory authorization. The FCC has held that cable systems are not common carriers because it is the cable system that decides what broadcast signals it will carry. *CATV and TV Repeater Services, supra,* 26 F.C.C., at 427-28. We may note

even here that the appropriateness of this conclusion may have been strongly affected by subsequent FCC actions, in that the television broadcast signals that cable systems may and must carry are now regulated entirely by the FCC and not left to the operator's choice. Cable Television Service, 37 Fed. Reg. 3252, 3262-67 (paras. 74-106). The impact of this development on its earlier conclusion has to date not been considered by the FCC or by the courts which upheld the earlier conclusion. See, *e.g., Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 359 F. 2d 282 (C.A.D.C. 1966).

But the important point is that the FCC's policy conclusions with respect to common carrier regulation, and the court decisions sustaining those conclusions, have rested solely on Class I cable services—the receipt and delivery of television broadcast signals. As this Court observed in *Southwestern Cable,* which concerned systems carrying only Class I signals, "the Commission and the respondents are agreed, we think properly, that *these* CATV systems are not common carriers within the meaning of the Act." (392 U.S., at 169 n. 29) (emphasis supplied). We need not now consider whether the march of events has altered the propriety of even that conclusion as to broadcast signal carriage. What is clear is that to impose a like policy determination on local cablecasting—whose programming control as between the cable operator and its subscribers is not inherently ordained by anything in the nature of the enterprise—requires a grant of statutory authority over intrastate wired communications which the FCC simply does not possess.

The thesis advanced by the State of Illinois, in other words, is that to require a cable system to exercise exclusive programming control over "origination cablecasting", and to encumber that system with broadcast-type regula-

tion, is to exercise a policy choice that has not been entrusted to the FCC. The State of Illinois, in company with other States, has opted for a different scheme of regulation which largely divorces carriage from programming and opens up local services to subscriber and user choice and control. The States' jurisdiction so to decide should be recognized and protected by this Court.

V.

ANY FRICTION OR INCONVENIENCE THAT MAY ARISE AS BETWEEN STATE REGULATION OF LOCAL CABLECAST SERVICES AND FEDERAL REGULATION OF INTERSTATE BROADCAST-DELIVERY CABLE SERVICES IS A MATTER FOR RESOLUTION BY THE CONGRESS:

The FCC has complained of, and the petitioners' brief refers to, "overlapping and incompatible regulations" by State and local authority. (Pet. Brief, p. 21.) In the main, this appears to refer to haphazard local franchising practices, which both the Illinois Commerce Commission and the FCC have moved to correct. Notice of Proposed Rule Making, Section A3; Cable Television Service, part V (in which the quoted phrase is found).[21] In this area the FCC has recognized and is prepared to deal with the existence of dual regulatory jurisdiction, with the FCC prescribing minimum procedural guidelines and the States and localities filling in the details and issuing the licenses. This has laid the groundwork for a cooperative approach to licensing of cable systems, which the State of Illinois

21. Copies of both of these documents have, as previously mentioned, been lodged with the Clerk of this Court.

aspects will provide a workable framework.[22] The point for present purposes is that no issues relating to the licensing process are involved in the question presented by this case.

If there is any further friction or inconvenience arising from dual regulatory jurisdiction with respect to cable services, the FCC has failed to specify its nature. This is not surprising, since the FCC proceedings have been concerned mainly with broadcaster-cable disputes and not with the division of federal-State regulatory authority. As the FCC itself put it in presenting its comprehensive cable regulations: "The carriage of distant television broadcast signals by cable television systems has been center stage in the continuing controversy between the Commission, the Congress, and the Courts." Cable Television Service, 37 Fed. Reg. 3252, 3259 (para. 57). Certainly the States heretofore have had barely a wing of that stage, insofar as the Courts and the Congress are concerned. See, *e.g.*, Hearings before the Senate Commerce Subcommittee on Communications, Feb. 8, 1972 (in which the entire colloquy during an 85-minute discussion of the FCC's just-released comprehensive cable television regulations concerned the impact of distant-signal importation on broadcast stations, and not one question was explored about the regulations relating to cablecast services). With the exception of *TV Pix, Inc.* v. *Taylor*, 396 U.S. 556 (1970), in which this Court upheld State regulatory authority, no State has been heard by the Congress or this Court before the present case.

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22. The Chairman of the Illinois Commerce Commission has been proposed for membership on a Federal-State Advisory Committee being created by the FCC to address practical accommodations of authority in the licensing area. 37 Fed. Reg. 3277 (para. 188); 37 Fed. Reg. 3204.

The petitioners nevertheless maintain that "the alternative to [Federal Communications] Commission regulation is the kind of fragmented regulatory pattern and chaotic development which characterized broadcasting in its early years and which led to the enactment of the Communications Act of 1934." (Pet. Brief, p. 20). This is demonstrably in error. "Chaos" occurred because of the physical properties of electro-magnetic radiation in the open atmosphere, creating interference between radio waves having similar frequency characteristics. It was this and this alone that caused the Congress to vest centralized jurisdiction in the FCC over radio broadcasting, extending even to intrastate radio communications because of their capacity to interfere with interstate broadcasting. Federal Communications Act, Section 301(d); *National Broadcasting Co. v. United States,* 319 U.S. 190, 210-14 (1943). No such problem exists with transmissions confined within a coaxial cable, and Congress has accordingly never conferred regulatory jurisdiction on the FCC to deal with intrastate communications by wire. Federal Communications Act, Sections 2(b), 221(b).

It may be that the plan of the Act, assigning federal-State regulatory jurisdiction over wired communications depending on the interstate or intrastate character of the signals that are carried, could some day cause practical difficulties in application to cable television. But this has been true for more than 50 years with telephone communications and other comparable forms of carriage in which the physical plant is devoted to both interstate and intrastate operations; and the federal system has managed

tolerably well.[23] The whole question was extensively considered and resolved in Justice Hughes' landmark opinion in *The Minnesota Rate Cases,* 230 U.S. 352, 432 (1913). That involved railroad carriers whose rights of way, terminals, rails, bridges, and stations were all used interchangeably for intrastate and interstate operations. It was argued that this extensive interblending of operations made dual regulatory jurisdiction confusing and impracticable. To which Justice Hughes responded:

> ". . . these considerations are for the practical judgment of Congress in determining the extent of regulation necessary . . . to conserve and promote the interests of interstate commerce."

The same answer applies to the petitioners' contentions in this case.

A final, after-the-fact reason for the FCC's effort to displace State regulatory authority can be found in its assertion that this is the proper way of fostering service experimentation by cable systems. See Cable Television Service, 37 Fed. Reg. 3270-71 (paras. 131, 132). There are three answers to this. First, if the FCC obtains jurisdiction over all cable operations as somehow "ancillary" to broadcasting, this will allow the broadcasting industry to claim competitive injury whenever it wishes to stifle a new cablecast service — which scarcely seems conducive to cable innovation. Second, State regulatory commissions are much closer than the FCC to the varying service needs and interests of their communities and can be expected to do a

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23. See Gabel, op. cit. supra, passim. The principal practical difficulties have related to the allocation of plant for the purposes of rate-base regulation. Neither the Illinois Commerce Commission nor the FCC is proposing such rate regulation of cable systems for the foreseeable future. Notice of Proposed Rule Making, Section A2; Cable Television Service, 37 Fed. Reg. 3276 (para. 183).

more effective job of promoting their realization.[24] Third, the most important area of experimentation that the FCC would foreclose is *regulatory* experimentation. What suits Illinois when it comes to local cablecast regulation may not exactly suit New York or Massachusetts or Minnesota. The federal system should tolerate and even welcome a degree of regulatory diversity on matters closely touching the kind and quality of local service in a dynamic field of evolving technology. For as Justice Brandeis pointed out in a related context, it is still

> ". . . one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[25]

The converse of this is that it would be gravely injurious to our healthy federal system for a single federal agency to arrogate to itself all decision-making with respect to the evolution of local services over a new communications medium — without at least the most searching Congressional review and authorization.

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24. The Illinois Commerce Commission, for example, is proposing that Illinois cable systems conduct a triennial survey of business and community needs for new cablecast services, designed to ascertain and implement desires for inauguration of new services and installation of more sophisticated equipment. Notice of Proposed Rule Making, Section B4(d); Appendix, infra, p. A31.

25. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General
PETER A. FASSEAS,
Special Assistant Attorney General
ROLAND S. HOMET, JR.
Special Counsel
Counsel for the State of Illinois
as Amicus Curiae

March, 1972

APPENDIX A

COMMUNICATIONS ACT OF 1934, 47 U.S.C. Section 151ff

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

§ 153. Definitions.

For the purposes of this chapter, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points or origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services

(among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(t) "State commission" means the commission, board or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

§ 221. (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State. . . .

APPENDIX B

FCC CABLECAST REGULATIONS, 47 C.F.R.

Subpart G — Cablecasting

§ 76.201 Origination cablecasting in conjunction with carriage of broadcast signals.

(a) No cable television system having 3500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by origination cablecasting and has available facilities for local production and presentation of programs other than automated services. Such origination cablecasting shall be limited to one or more designated channels which may be used for no other purpose.

(b) No cable television system located outside of all major television markets shall enter into any contract, arrangement, or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6 - 11 p.m.) for local programming designed to inform the public on controversial issues of public importance.

(c) No cable television system shall carry the signal of any television broadcast station if the system engages in origination cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 76.205, 76.209, 76.213, 76.215, 76.217, 76.221, and 76.225.

§ 76.205 Origination cablecasts by candidates for public office.

(a) *General requirements.* If a cable television system shall permit any legally qualified candidate for public

office, to use its origination channel(s) and facilities therefor, it shall afford equal opportunities to all other such candidates for that office: *Provided, however,* That such system shall have no power of censorship over the material cablecast by any such candidate; and *Provided, further,* That an appearance by a legally qualified candidate on any:

(1) Bona fide newscast,

(2) Bona fide news interview,

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) On-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.

NOTE: The fairness doctrine is applicable to these exempt categories. See § 76.209.

(b) *Rates and practices:* (1) The rates, if any, charged all such candidates for the same office shall be uniform, shall not be rebated by any means direct or indirect, and shall not exceed the charges made for comparable origination use of such facilities for other purposes.

(2) In making facilities available to candidates for public office no cable television system shall make any discrimination between candidates in charges, practices, regulations, facilities, or services for or in connection with the service rendered, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any

cable television system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

(c) *Records, inspections.*

Every cable television system shall keep and permit public inspection of a complete record of all requests for origination cablecasting time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the system of such requests, the charges made, if any, and the length and time of cablecast, if the request is granted. Such records shall be retained for a period of two years.

(d) *Time of request.*

A request for equal opportunities for use of the origination channel(s) must be submitted to the cable television system within one (1) week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided, however,* That where a person was not a candidate at the time of such first prior use, he shall submit his request within one (1) week of the first subsequent use after he has become a legally qualified candidate for the office in question.

(e) *Burden of proof.*

A candidate requesting such equal opportunities of the cable television system, or complaining of noncompliance to the Commission, shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office.

§ 76.209 Fairness doctrine; personal attacks; political editorials.

(a) A cable television system engaging in origination cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

NOTE: See public notice, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 F. R. 10415.

(b) When, during such origination cablecasting, an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group, the cable television system shall, within a reasonable time and in no event later than one (1) week after the attack, transmit to the person or group attacked: (1) notification of the date, time, and identification of the cablecast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the system's facilities.

(c) The provisions of paragraph (b) of this section shall not be applicable: (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (b) of this section shall be applicable to editorials of the cable television system).

(d) Where a cable television system, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the system shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office, or (ii) the candidate opposed in the editorial, (*a*) notification of the date, time, and channel of the editorial; (*b*) a script or tape of the editorial; and (*c*) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the system's facilities: *Provided, however,* That where such editorials are cablecast within 72 hours prior to the day of the election, the system shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

§ 76.213 Lotteries.

(a) No cable television system when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or

chance if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program cablecast on the system in question.

§ 76.215 Obscenity.

No cable television system when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels material that is obscene or indecent.

§ 76.217 Advertising.

A cable television system engaged in origination cablecast programming may present advertising material at the beginning and conclusion of each such program and at natural intermissions or breaks within a cablecast: *Provided, however,* That the system itself does not interrupt the presentation of program material in order to intersperse advertising; and *Provided, further,* That advertising material is not presented on or in connection with origination cablecasting in any other manner.

NOTE: The term "natural intermissions or breaks within a cablecast" means any natural intermission in the program material which is beyond the control of the cable television operator, such as time-out in a sporting event, an intermission in a concert or dramatic performance, a recess in a city council meeting, an intermission in a long motion picture which was present at the time of theatre exhibition, etc.

§ 76.221 Sponsorship identification.

(a) When a cable television system engaged in origination cablecasting presents any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such system, the system shall make an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, such cablecasting unless it is so furnished as consideration for an identification in a cablecast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the cablecast.

(b) Each system engaged in origination cablecasting shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for origination cablecasting, information to enable it to make the announcement required by this section.

(c) In the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, script, or other material or services of any kind are furnished, either directly or indirectly, to a cable television system as an inducement to the origination cablecasting of such program, an announcement to this effect shall be made at the beginning and conclusion of such program: *Provided, how-*

ever, That only one such announcement need be made in the case of any such program of five (5) minutes' duration or less, either at the beginning or conclusion of the program.

(d) The announcements required by this section are waived with respect to feature motion picture films produced initially and primarily for theatre exhibition.

APPENDIX C

OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT

Washington, D. C. 20504

Director

November 15, 1971

Honorable John O. Pastore
United States Senate
Washington, D.C. 20515

Dear Senator Pastore:

You have asked me to provide you with the Administration's views on the FCC's cable television proposals, as well as Administration recommendations resulting from the work of the special Cabinet Committee on broadband cable. Since the Committee will not address specifically the FCC's proposed conditions of distant-signal carriage, and since it will in any event not complete its work for several more weeks, I am replying separately to your first request.

The Administration's views on the FCC proposals can be summarized as follows:

(1) It is highly desirable that the "freeze" on cable development in the major markets be eliminated, and that the new medium be permitted to proceed with its growth as soon as possible in an atmosphere conducive to stability and cooperation among the various interests involved in providing program services to the public.

(2) Those matters pertaining to cable retransmission of broadcast television signals which the FCC has addressed (i.e., permissible distant sig-

nals, definition of local signals and "anti-leapfrogging") involve the type of substantive determination which, within broad limits, is best resolved by an administrative agency. Those proposals should be supplemented, however, with provisions applicable to radio signals and with restrictions upon importation of copyrighted programming.

(3) The balance of the proposals, including the division of federal-state authority over broadband cable services, are predicated on unclear authority and address issues of major national concern which will ultimately determine the form and structure of the new industry. Implementation of these proposals should not be allowed to preclude thorough Congressional review of the fundamental policy questions which the Cabinet Committee is considering.

The Supreme Court has affirmed the FCC's authority to impose those regulatory requirements on cable television that are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The FCC's proposals dealing with carriage of television broadcast signals clearly fall within this authority. Accordingly, there is no question of the FCC's power to resolve such issues as the definition of "local" signals, the appropriate number of distant signals to be carried by cable systems, and restrictions on the points of origin of distant signals (i.e., "anti-leapfrogging").

We have no substantive comments on these aspects of the proposed rules. These provisions are intended to pro-

vide cable with an opportunity for immediate growth, while protecting the economic viability of our "over-the-air" television broadcast system. They involve judgmental determinations of the type which, within broad limits, Congress must of necessity leave to the discretion of its regulatory agencies. What is essential, as far as the broadcast-carriage proposals are concerned, is that there be prompt adoption of a regulatory approach which will receive general acceptance, thereby enabling the sound growth of the industry to proceed.

There are, however, several problems which these broadcast-related proposals leave unresolved: first, there is the problem of the importation of distant radio signals, and second, the problem of exclusivity protection for copyrighted television programming.

Leaders of the affected industries have recently reached an agreement regarding provisions that deal with these concerns and also involve minor modifications of some broadcast-related items already included in the Commission's proposals. If reflected in the Commission's final rules, this agreement would fully meet our concerns regarding radio and copyright. Absent this accord on the final rules, there is serious risk that an end to the freeze will be delayed by challenges in the courts and Congressional hearings on these matters. We believe the public interest would not be served by such developments.

Turning now to those aspects of the proposals which go beyond the conditions of cable retransmission of over-the-air signals, relating to broadband cable as a communications medium in its own right: These aspects of the proposed rules (together with existing rules and further contemplated rulemakings) involve such matters as Federal preemption of state and local control, the extent of

FCC supervision of programming, limitations on numbers of channels, flexibility with respect to new services, and prescribed channel usage. These and other matters of like importance will shape the economic structure, and indeed the character, of the new medium. They are the subject of the Cabinet Committee's work and will untimately require careful Congressional consideration. The Commission itself has noted that the recent *Midwest Video* case casts doubt upon the legality of this type of regulation, and it has requested Congressional clarification. Similarly, we believe the 1934 Communications Act provides inadequate guidance for the regulation of broadband cable communications. Therefore, while we favor immediate implementation of the proposed rules in order to permit the growth of cable television, our recommendation is based upon the hope and expectation that Congress will address these fundamental aspects of broadband cable policy at an appropriate time, before the economics of the industry and the character of the medium have become irreversibly set in the mold contemplated by the Commission.

As you have stated, cable television involves many fundamental and complex policy matters of national importance. Until they can be resolved by due Congressional deliberation, we believe the public interest will best be served by ending the cable "freeze" through adoption of the FCC proposals. This course of action will enable the Congress to give its full attention at a later time to the major issues involved in the future of broadband communications services without further delaying the expansion of cable television service for the American people.

Sincerely,

/s/ Clay T. Whitehead

Clay T. Whitehead

APPENDIX D

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission, on its own motion, Investigation of Cable Television and other forms of Broadband Cable Communications in the State of Illinois	Docket 56191

INTERIM OPINION AND ORDER

* * * * *

Summary and Order

The Commission adopts the following findings of fact and conclusions of law:

1. Cable television is a system of delivery of television signals over a grid of coaxial cables possessing a broad frequency bandwidth, which system can also deliver a variety of other video, audio, and data-grade signals. The system as a whole is properly termed "broadband cable communications."

2. While only a small proportion of Illinois residents have as yet been offered cable television service, franchise proceedings to inaugurate such service are now underway in Illinois communities containing a majority of the State's residents.

3. The business of providing cable television and other forms of broadband cable communications is an engagement "for public use" in "the transmission of telegraph or telephone messages within this State", within the mean-

ing of Section 10-3(b) of the Public Utilities Act, Ill. Rev. Stats., Ch. 111⅔, Sec. 1 et seq.

(a) As a matter of practical construction, "telephone" service within the meaning of the statute has come to mean a total telecommunications service embracing narrowband and broadband transmission of a wide variety of video, audio, and data-grade messages including television signals.

(b) There is at present a significant service overlap between the offerings of cable television and telephone companies, restrained from full competitive realization by a federal antitrust consent decree entered into by the Bell system and by a cease-and-desist regulation of the Federal Communications Commission affecting independent telephone companies. Neither of these legal restraints is immutable, and present federal policy favors the development of regulated competition for the total telecommunications service each industry is or can become technically equipped to provide.

(c) The huge financial needs of the cable television industry, if it is to meet the objective of wiring the cities and towns of America over the coming decade, will require the adoption of financing techniques similar to those employed by the conventional telephone industry; namely, the floating of high-rated, long-term utility securities.

(d) The methods of operation of the two industries are closely comparable. Both offer a mix of analogue and digital communications. Both have evolved and are evolving from reliance on one dominant medium of transmission to employment of a combination of coaxial cable, wire, and microwave. And the trend in both industries has been and is from the initial offering of party-line service to the development of switched services.

4. The Commission therefore has, and hereby asserts, jurisdiction to regulate cable television and other forms of broadband cable communications as a statutory public utility.

5. The elaboration of rules and regulations governing the exercise of that jurisdiction will require careful consideration, after further hearings to be held on a Notice of Inquiry and of Proposed Rule Making now being formulated by the Commission.

6. Three important issues are being expressly left open for further evidence and comments in those hearings. They are:

(a) The extent to which, and the procedures whereby, presently operating systems should be "grandfathered" by having their operating authority confirmed, or excluded from regulation because of their limited size or operation (e.g., apartment-house "master antenna" systems).

(b) The nature and timing of regulations, appropriate to the present stage of development of broadband cable communications in the State of Illinois, addressed to the determination of "just" and "reasonable" rates.

(c) The possibility of developing cooperative certification procedures with Illinois municipalities, so as to give them a suitable voice in planning for and meeting the communications needs of their local residents.

7. Pending the elaboration of such rules and regulations, the Commission proposes as nearly as possible to maintain the *status quo*. This means that no construction of authorized but unbuilt cable systems may be undertaken,

nor may any other activity be carried out that would, under the Public Utilities Act, require Commission authorization — unless in a particular case the Commission waives the application of one or more provisions of the Act on the basis of a showing of severe and demonstrable hardship.

8. State regulation by the Commission is not only authorized but necessary to counter the challenge of possible federal regulatory pre-emption. The undeniable local interest in the nature and quality of broadband communications services can be better served by a combination of Federal and State regulation than by exclusively Federal control.

9. Federal and municipal regulatory authorities together lack the control capacity to prevent the under-financing and under-engineering of cable television systems, particularly in the larger markets where greater technical sophistication and capital expenditures will be required. This Commission and its staff are accustomed to meeting such problems with other regulated utilities, and to assuring the preservation and upgrading of service quality by already installed systems. A cable television system, being a *de facto* monopoly, lacks the incentive if not effectively regulated to assure the maintenance of top-quality service.

10. The overriding public interest in the service potential of broadband cable communications takes three distinctive forms:

(a) "channel choice", or the diversification of entertainment and information services available at the option of television viewers and subject to their selection, in their homes and places of business;

(b) the availability to would-be subscribers of cable television service without undue delay or discrimination, and without excessive signal degradations or outages; and

(c) the availability to would-be programmers and advertisers — including sources of information, news, opinions, education, entertainment, and home and business services — now excluded as a practical matter from the mass television broadcasting medium, of nondiscriminatory and legally guaranteed access to leased cable channels for the purpose of transmitting their messages.

The Commission will include detailed rules for the realization of those objectives in its Notice of Proposed Rule Making.

IT IS THEREFORE ORDERED that:

(1) The Commission hereby assumes jurisdiction under Sec. 10-3(b) of the Public Utilities Act, Ill. Rev. Stats., Ch. 111⅔, Sec. 10-3(b), over "broadband cable communications systems", defined to mean and include any system of coaxial cables or other electrical conductors and equipment used or capable of being used for the delivery of television or radio signals, or voice or data, by analogue or digital transmission, to subscribers in the State of Illinois for a service fee, whether such messages were obtained off-the-air or locally originated or both; together with appurtenant towers and antennas, origination and control centers, switching and computer facilities, and all lines, fixtures, equipment, attachments, and appurtenances thereto used or useful in the construction, maintenance, and operation of such a system.

(2) The hearings in this proceeding are hereby continued indefinitely, pending the elaboration of specific

rules and regulations for the broadband cable communications industry.

(3) The Commission will issue as soon as they can conveniently be prepared: (a) a summary of the record to date, and (b) a Notice of Inquiry and of Proposed Rule Making. When these documents have been issued, the hearings will resume on the issues identified in the latter Notice.

(4) Pending the completion of these proceedings, and the adoption of specific rules and regulations for the broadband cable communications industry, no new construction within the meaning of Sec. 55 of the Public Utilities Act may be undertaken by such industry in Illinois, unless and except to the extent that the Commission grants a waiver of this restriction in particular cases on good cause shown. Previously planned activities other than such new construction may however be carried out during this period without Commission authorization by broadband cable communications systems that have, as of the date of this order, already engaged in substantial construction of their systems. No other system may take any action during this period that would under the provisions of the Public Utilities Act require Commission approval, unless and except to the extent that the Commission grants a waiver of this restriction with respect to one or more of such provisions in particular cases on good cause shown.

By order of the Commission this 9th day of September, 1971.

/s/ DAVID H. ARMSTRONG
Chairman

[SEAL]
WSC/lw

APPENDIX E

ILLINOIS COMMERCE COMMISSION, NOTICE OF PROPOSED RULE MAKING IN DOCKET 56191 —BROADBAND CABLE COMMUNICATIONS— ADOPTED JANUARY 5, 1972

* * * * *

4. Initial service capacity and expansions thereto.

(a) *Channel number and use.* The broadcast signals that can be carried by cable systems are regulated exclusively by the FCC. This Commission will require only that Illinois cable systems carry the maximum number of permissible broadcast signals. In addition, when there are specific criteria to be met (*e.g.*, the determination of "significant viewing" of nearby out-of-market signals as defined by the FCC), the burden of exercising best efforts to meet these criteria should be placed on the system operator.

As for *nonbroadcast* services, the regulatory proposals of the FCC stand on far less certain footing. The State of Illinois has joined in litigation (*United States* v. *Midwest Video Corporation,* U.S. Supreme Court, No. 71-506) aimed at resolving the authority of the FCC in this area, which the federal Office of Telecommunications Policy has characterized as "unclear" and requiring Congressional review. For present purposes, this Commission will accept the FCC proposals as helpful guidelines to minimum service requirements. There are several nonbroadcast services to be considered.

First, either separately or in conjunction with local program origination, one channel should offer passive display services on a continuing 24-hour basis: time and

weather and the day's program log on all channels, both broadcast and nonbroadcast, at a minimum. These passive displays may also carry advertising on the top or bottom half of the screen. Second, the cable operator *may* offer its own local programming, over the same or one different channel, but only on a non-profit basis; that is, the sum total of any advertising revenues it earns in connection with such programming must recover no more than its direct costs. The Commission's concern here is to avoid giving the cable operator a proprietary interest in its own programming that could conflict with the public interest in promoting widely diverse programming opportunities on the other cable channels. It should be noted that the FCC's local origination requirement has been suspended pending the outcome of the *Midwest Video* litigation previously referred to; and in any case its definition of "cablecasting", namely programming "originated by the CATV operator or by another entity", can be satisfied by ensuring adequate local access to free or leased channels as described below. This Commission does not believe that either the "equal time" or "fairness" provisions of FCC regulations are properly applicable to cablecast programming, so long as ample channel capacity is provided over public-access and leased channels to accommodate all points of view.

The FCC is proposing that each cable system set aside one dedicated channel each for public-access, educational, and governmental use. These channels would be offered without time charges, but the operator could recover production costs (aside from those for live studio presentations not exceeding five minutes in length). The public-access channel would be non-commercial and available at all times on a non-discriminatory basis. Dedication of addi-

tional channels for these purposes would be precluded unless the FCC consents.

There are problems with this proposal. One channel each for the described purposes may be quite inadequate to the needs of many communities, yet requiring still further "free time" from cable operators may saddle them with unmanagable financial burdens. This Commission therefore proposes to adopt the FCC proposals provisionally, and to deal with additional access needs through its own regulation of leased channel operations.

On this subject the FCC proposals seem inadequate. They include no requirement regarding channel allocation beyond the stipulation that at least one leased channel give priority to part-time users. While there is always an element of hazard in borrowing concepts uncritically from other fields, this Commission believes that a minimum of one leased channel on each system should be operated on "common carrier" principles. This means that rates would be uniform and not so high as to discourage any member of the public from applying to use them; that this channel would have adequate studio and production equipment; and that the cable system would adopt rules and practices designed to prevent preemption of excessive time by any user or class of users during specified time periods. The Commission will require that the operator's proposed rules and rates for these services be submitted for its approval.

The remainder of the available channels may be dedicated or contracted for any of the following purposes, with the allocation to be made by the operator on the basis of the survey of community needs: (1) additional educational and municipal channels, at rates that will at least recover the operator's costs; (2) special business and professional services, such as stock quotations or medical seminars, sent

to limited classes of subscribers; (3) home service such as shopping by wire, as well as news and entertainment programming acquired commercially by the operator; (4) pay cable offerings of major sports and entertainment events, to the extent permitted by the FCC (*note* that local franchise prohibitions of pay cable are precluded); and (5) other services as they are developed. The operator's service proposals for these channels may be made the basis for municipal selection of a franchisee, subject to later application by an operator to this Commission for changes in the light of operating experience.

Just as with a telephone company, a cable system shall exercise no content control over any programming (other than its own, if any), and any liability for injurious programming shall attach to its originator rather than to the cable system. The cable operator's rules shall require that this be made plain to all users, and any user that is judicially found liable for obscenity or libel or incitement to riot or sedition as a result of its programming may be barred by the Commission from further use of all cable systems in the State for up to three years. Beyond that, a large preference in franchise (or certification) proceedings should be awarded to any cable operator who proposes to provide subscribers with a scrambling device and locked switch to give parents control over the viewability of nonbroadcast channels.

Overall channel capacity will be the critical determinant of the number and variety of specialized nonbroadcast services made available to communities. The FCC has proposed a minimum of 20 channels in the top 100 markets, while leaving room for upward deviations, but has said nothing about the number or configuration of broadband cables required to carry this number of signals with-

out loss of quality. The FCC has also proposed that the nonbroadcast band width in all markets be at least as broad as the frequency spectrum utilized for carriage of broadcast signals. This Commission accepts those minima but believes they require expansion and elaboration.

A very helpful guide in these matters is to be found in Appendix A to the recent comprehensive Report of the Sloan Commission on Cable Communications,* whose findings are consistent with the evidence presented to this Commission. Of the various presently available system configurations for delivering multiple channels, the one that offers the most flexibility at reasonable cost with built-in expansion capacity and maximum freedom from internally generated interference and distortion problems appears to be the multiple cable. At the outset, a dual cable using VHF-only standard broadcast channels can assure quality signals over a nominal capacity of 24 channels, albeit an actual capacity of only 16-20 channels (or as few as 10 in major television markets such as Chicago) because of interference from strong local broadcast signals. In smaller communities, below 50,000 in population, this should ordinarily be enough to accommodate all initial demand for off-the-air signals, local origination, leased and dedicated channels, and other uses such as FM radio. Experience indicates that it takes time and effort to stimulate use of public-access and common-carrier channels; other leased, pay-cable, and specialized programming also will take time to develop; and it will be some time before regional or national cable networking makes significant demands upon spare channel capacity.

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* John E. Ward, "Present and Probable CATV/Broadband-Communication Technology", Sloan Report, p. 179 (McGraw-Hill, 1971).

As these demand factors develop and electronic technology is improved to keep pace, a dual-cable system can readily incorporate improved converters and return-path amplifiers (which need be fitted on only one of the cables), so as to offer as many as 50 (ultimately, perhaps 70) broadcast-band-width channels with two-way capability at no observable loss of quality. The anticipated costs of such a dual cable/converter system with upstream channel capacity are fairly comparable to those for a single-cable multiplexed system, and the quality and flexibility of the former appear considerably superior. It should be noted that the principal cost component in building a system is not the purchase cost of the cable itself but the construction cost of stringing the cable through ducts or on poles. Initial installation of more than one cable should thus offer long-term savings.

The Commission therefore proposes to require that systems in communities below 50,000 in population provide a minimum of two trunk, feeder, and tap-off cables either in parallel or encased in a multi-tube housing. For systems in larger communities, a minimum requirement of three cables — with 24 or more assured channels at the outset, expandable to 75 or more over time — seems necessary and advisable.

The population standard would be applied to communities rather than franchise areas, even though the Commission recognizes that larger communities are likely to franchise two or more cable systems each serving only a portion of the population. There are physical constraints on the size of a single cable system, such that — according to expert engineering testimony presented to the Commission — it may prove necessary in a city the size of Chicago to franchise perhaps four to six separate systems. But

some at least of the messages carried on such systems are likely to be of immediate interest to residents of other franchised areas within the larger community; and there should be adequate channel capacity on each system to interconnect for this purpose with the others. Indeed when the community as a whole exceeds a certain size there may be reason for the Commission to specify an even higher minimum capacity. Tentatively, and with the invitation of comments, the Commission proposes to classify a "community" for population purposes in accordance with the Census Bureau's definition of a Standard Metropolitan Statistical Area; and to specify a minimum of four cables in SMSA's with a population in excess of 250,000.

(b) *Other capacity.* Two-way capacity will be necessary to realize cable's service potential in a number of areas, and amplifiers with return-path capability have been made commercially available. The major variables relate to signal grade, switched service, and subscriber terminal equipment.

The available return bandwidth can be used for either "data grade" or "video grade" signals. The "video grade" capability can be used to link fixed or mobile studios to the head-end for distribution on the system of local programming. This requires no subscriber terminal equipment, and indeed the costs and limited foreseeable uses of home video origination are such as to rule out the present requirement of any such equipment. So also, while it is conceptually possible to develop point-to-point switched video services, so that any subscriber could talk to and see any other subscriber, the costs for such an operation appear at present to be wholly out of reach.

This then leaves video-grade two-way usage a matter for the system operator to incorporate in his studio and

mobile origination design. The subscriber will be interested in data-grade equipment, which may be either for "simple monitoring" or "more general narrow-band communication and control capabilities" (the quoted phrases are taken from, and more extensively described in, the Sloan Commission Report at p. 182). The Commission proposes to require that one of these two types of services be offered by cable systems, and that the choice be made by municipal officials as part of the competitive franchising process. Local officials may also decide to require that cable systems provide a separate cable (in addition to those employed for signal delivery) for return signals. Some of the more modern systems, such as at Reston, Virginia, have done this.

It will in any event be necessary for cable systems to provide a switch and visible or audible signal on or in close proximity to a subscriber's television receiver, so that he may know at all times whether a return signal is being transmitted and may positively control feed-back originating from his home.

Studio facilities and equipment for live and taped cablecast production must also be provided for the dedicated governmental, educational, and public-access channels, as well as for the leased common-carrier and specialized channels, and technical assistance must be made available to users of these channels. The equipment should be capable of play-back of all standard sizes and types of film, video tape, and sound recordings and audio tape. The number and location of fully-equipped studios is difficult to specify in the abstract, and the Commission would welcome evidence and comments on this point. As a starting point, it seems necessary to provide separate studios for each of the dedicated channels, and one for all other cable-

casting purposes (bearing in mind that many transmissions will be taped and that usage may develop slowly at first)—for a minimum of four, to which local franchising officials could add. The possibilities of combining equipment and/or studios are not clear, however. The Commission believes that studio and equipment requirements should not exceed those for which there is an immediate use, since it is fairly easy to add capacity of this sort as demand requires, and because cable operators should be assured of the opportunity to earn a return on the studios and equipment they provide.

One other possibility which is being pursued in some communities bears mention at this point. That is for the cable operator to satisfy in full his responsibilities for educational and governmental uses of the system by making one separate cable available free of charge solely for such uses, with channel allocation on that cable decided by a committee of municipal and school-system officials. Under such an arrangement, the cable operator would be relieved of the cost of providing studios and equipment and technical assistance for governmental and educational programming. The Commission proposes to give sympathetic consideration to such arrangements, and would welcome comments on whether they should be established in the form of a general requirement.

(c) *Expansion capacity.* The Commission's proposed rules with regard to expandable channel and two-way capacity have already been described above. The Commission will also require that system designs be sufficiently flexible to incorporate more sophisticated developments when and if commercially proven. These prominently include, based on present knowledge: computer switching and program-access centers; the neighborhood exchanges and twisted-wire leads associated with dial-access systems;

and origination points for cable conferencing as now offered by the British Postal Office. System designs should indicate where and how such developments could be added to the system after its construction.

(d) *Timing of future expansions.* In order to determine when new services or equipment should be added to systems, it is necessary to keep abreast both of technological developments and of market demand. The FCC's so-called "N plus 1" proposal would deal only with additions to the number of channels and not with inauguration of new services or installation of more sophisticated equipment. This Commission proposes to deal with those questions by requiring a triennial survey of business and community needs, to be conducted by each cable system. The survey form, which the Commission proposes to develop and refine periodically with the aid of an industry advisory group including consumer representatives, would be designed to determine: (1) the commercial availability of new equipment and programming services; (2) the demand for such innovations by both present and potential subscribers; and (3) the extent of the subscribers' willingness to pay for the costs and appropriate profits associated with such innovations. The record of the cable operator in responding to these surveys, as compared with the performance of similarly situated operators in Illinois and other states, would be a matter for consideration by the Commission on applications for rate increases and at the 10-year certificate renegotiation.

(e) *Present systems.* Illinois cable systems that are "grandfathered" by the Commission would have to bring themselves into substantial compliance with the foregoing requirements when they are (1) transferred to other ownership, (2) extensively rebuilt or (3) up for 10-year certificate renegotiation before the Commission.

APPENDIX F

92d CONGRESS
1st SESSION

S. 792

IN THE SENATE OF THE UNITED STATES

FEBRUARY 17, 1971

Mr. PASTORE (by request) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To amend the Communications Act of 1934 to provide for the regulation of community antenna television systems.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service".

(b) Part I of title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) is amended by inserting therein, immediately after section 330 thereof, the following new section:

"REGULATION OF COMMUNITY ANTENNA SYSTEMS

"SEC. 331. (a) The Commission shall, as the public interest, convenience, or necessity requires, have authority—

"(1) to issue authorizations and orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary or appropriate to carry out the purposes of this Act, with due regard to the orderly accommodation of both the community antenna and broadcasting industries, in order to secure maximum diversity of programming through the maintenance and expansion of broadcasting and the provision via community antenna systems of multiple reception, origination, and related services; and

"(2) to make general rules exempting from regulation, in whole or in part, certain community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application

of any rule or regulation concerning the carriage of broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were validly in operation on April 1, 1970.

"(b) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under the Act of September 30, 1961 (75 Stat. 732; 15 U.S.C. 1291 et seq.).".

APPENDIX G

ARTHUR D. LITTLE, INC./NEWS
Public Relations Department

25 Acorn Park / Cambridge, Mass. 02140 / (617)864-5770
INFORMATION CONTACT:
Patricia K. Finnegan, Ext. 2411

FOR RELEASE: Immediate

NEW CABLE SERVICES—A STEP NEARER

Cambridge, Massachusetts . . . Arthur D. Little, Inc. (ADL)—the international management consulting firm—announced today that it has been retained by a group of United States and Canadian companies for further study of the economic viability of interactive cable services.

This jointly sponsored project is expected to be a significant step in developing a new technologically oriented business and a new communication medium for the United States and Canada. It will help overcome a major deterrent until now to the development of new cable services anywhere in the world, namely the uncertainty as to what combination of new services would both successfully serve public needs and also be economical. A key objective of the project is to ascertain the profit potential of services in addition to entertainment TV on a far more factual basis than has ever before been attempted.

The experimental project is oriented toward actually testing how consumers, business, and local government will use new cable services. Wherever possible the field test will use existing communication facilities, prototype terminal and control equipment, and existing data-storage equipment. The test site will be located in a geographic

area where cooperative effort exists among local educators, municipal agencies, advertisers and communication systems organizations. The flexibility of the test system will allow a large number of tests to be performed by many organizations.

The plans to be developed constitute Phase II of a three-phase project. Phase I, a market study, was concluded in mid-1971. Called "BCN" (Broadband Communication Networks), the project's first phase was sponsored by 36 U.S. and Canadian firms. Although the findings are confidential to the participating firms, initiation of the Phase II market test planning suggests that profitability for new cable services was found to be a definite possibility. Phase III will be the actual field test.

ADL Project Manager, John P. Thompson, said, "The Phase I market study indicated that people are interested in a significant number of new services and types of public- and private-service programs. Phase II of the project will design a flexible, sophisticated market test system to prove in the field the value of a wide variety of cable services. Firms already involved in the project include: the Bank of America, Bell Canada, Burlington Industries, Encyclopedia Britannica, IBM, Magnavox, Million Market Newspapers, Southam Press, Westinghouse and Zenith. Participation in the project is still open to companies and government agencies who are interested in helping to develop a new communication medium for the United States and Canada and in testing their services over such a network."

Cable systems have the capability of delivering literally dozens of extra TV or video channels to homes and carry return signals of viewer opinion for shopping at home, home education and testing, audience participation

programs and surveys, and even local, state, and federal voting.

Many knowledgeable observers believe that cable television has enormous potential in the administration and operation of cities and states, and in the reduction of the communication gap that exists in many areas. Thus, federal, state, and municipal government agencies have been and are continuing to be invited to participate in the project.

Public institutions are expected to make extensive use of cable systems. Educational job-training programs for the disadvantaged or the shut-in, or at least programs to tell people what help is available, will have the added benefit of obtaining reactions over a return channel. School boards will be able to receive citizen response from home viewers during crucial meetings. Law enforcement agencies will be able to increase their communication and surveillance services for business and citizens, and enhance interpersonal relations with the communities they serve. Government agencies will be able to gain immediate voter response to policies, programs, and new ideas, thereby enabling them to be more responsive to the needs and desires of citizens.

The potential impact of new communication services on business and consumers extends into even more areas. Banks, real estate firms, travel agencies, and insurance companies, for example, may use the system for improved interaction with customers as well as for internal services.